Judgment

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1971

No. 71-1580

PFIZER INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, SQUIBB CORPORATION, and THE UPJOHN COMPANY,

Petitioners,

—v.—

HONORABLE MILES W. LORD, United States District Judge,

Respondent,

and

STATE OF KANSAS and NAMED PLAINTIFFS IN FORTY-EIGHT OTHER CASES,

Respondents.

On Petition for a Writ of Mandamus to Disqualify The Honorable Miles W. Lord as Judge in These Cases.

This matter came on for consideration before this Court on a petition for writ of mandamus to disqualify the Honorable Miles W. Lord as Judge; the answers thereto; motion of respondents for damages and costs and response thereto, and transcripts and depositions filed in the United States District Court for the District of Minnesota.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the petition for writ of mandamus be and is hereby denied, in accordance with per curiam opinion of this Court filed herein.

And it is further ordered that the motion of respondents for damages and costs in this matter be and is hereby denied.

February 15, 1972

A true copy.

Attest:

ROBERT C. TUCKER
Clerk, U. S. Court of Appeals, 8th Circuit.

by H. F. GRUENINGER
Chief Deputy

March 27, 1972

Opinion Dated February 15, 1972

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PFIZER INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, SQUIBB CORPORATION and THE UPJOHN COMPANY,

Defendants-Petitioners,

—v.—

HONORABLE MILES W. LORD, United States District Judge,

Respondent,

and

STATE OF KANSAS and NAMED PLAINTIFFS IN FORTY-EIGHT OTHER CASES,

Plaintiffs-Respondents.

On Petition for a Writ of Mandamus to Disqualify The Honorable Miles W. Lord as Judge in These Cases.

February 15, 1972.

Before:

MATTHES, *Chief Judge,*
BRIGHT and ROSS, *Circuit Judges.*

PER CURIAM.

Petitioners, Pfizer Inc., American Cyanamid Company, Bristol-Myers Company, Squibb Corporation, and The Upjohn Company, manufacturers of drugs, bring this action, seeking a writ of mandamus pursuant to the All Writs Statute, 28 U.S.C. §1651, and FRAP Rule 21 directing the Hon. Miles W. Lord, District Judge for the District of Minnesota, to recuse himself from presiding over the above entitled cases. Before instituting this action, petitioners, on September 20, 1971, filed moving papers and affidavits pursuant to 28 U.S.C. §144, asking Judge Lord to disqualify himself for reasons of bias and prejudice. Judge Lord orally denied the motion for "legal insufficiency." Although Judge Lord has declined to respond to petitioners' allegations, respondents, who are plaintiffs in the pending actions, have filed answers objecting to the issuance of the writ. In a separate motion, respondents seek damages and costs allegedly suffered by reason of delay to the proceedings attributable to the filing of petitioners' action.

We have carefully examined the petition, the underlying joint affidavit, the responses thereto, and portions of the record pertinent to petitioners' claims. We reach the merits of the petition and deny petitioners the relief requested. We also deny respondents' motion for damages. We do, however, deem it appropriate to comment on certain aspects of this case.

In a separate action filed contemporaneously, petitioners seek a writ of mandamus as a means of obtaining relief from a discovery order issued by Judge Lord which requires disclosure of certain documents and papers which

petitioners claim to be covered by the attorney-client privilege. Our opinion in that controversy, No. 71-1581, and our opinion in this case are filed together.

I.

Background of the Present Litigation

The present lawsuits involve forty-nine civil antitrust damage actions which have been brought by a number of different categories of plaintiffs, including the United States, states, wholesalers and retailers, insurance companies, private hospitals, agricultural purchasers, and competitors. These actions, and approximately one hundred others, most of which now have been settled, grew out of Federal Trade Commission proceedings instituted in 1958[1] and a criminal antitrust action brought by the United States in 1961.[2]

In substance, the various complaining parties charge that petitioners, individually and in concert, committed fraud on the United States Patent Office in connection with the prosecution of the Conover patent owned by Pfizer on tetracycline, a broad spectrum antibiotic, and, in addition, that they thereafter conspired to exclude competition and fix antibiotic drug prices in violation of the Sherman Act.

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[1] In the matter of American Cyanamid Company, et al., Docket No. 7211 (complaint filed July 28, 1958), *order vacated and remanded*, 363 F.2d 757 (6th Cir. 1966), *order after remand aff'd*, sub nom., *Chas. Pfizer & Co., Inc.* v. *Federal Trade Commission*, 401 F.2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969).

[2] *United States* v. *Chas. Pfizer & Co., Inc.*, 61 Cr. 772 (Indictment returned August 17, 1961), *rev'd for new trial*, 426 F.2d 32 (2d Cir.), *prior en banc hearing order vacated, opinion of panel modified, and petition for rehearing denied*, 437 F.2d 957 (1970), *new trial determination aff'd by equally divided court*, . . . U.S. . . . (No. 70-72, Jan. 24, 1972).

The pricing policies of these drug companies were the subject of Federal Trade Commission investigations between 1951 and 1958 and an extensive investigation by a Senate subcommittee, which subsequently reported its findings to the full committee.[3]

Following the Commission proceedings, several civil antitrust actions were brought against some or all of the petitioners. After the jury verdict in the criminal case, more than one hundred similar actions were commenced. A large number of these cases were venued in the Southern District of New York, some having been commenced in that district and others having been transferred to that district for coordinated pretrial proceedings before the Hon. Inzer B. Wyatt. A majority of these cases were settled with the approval of Judge Wyatt. His opinion approving the settlement is reported as *State of West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd* 440 F.2d 1079 (2d Cir. 1971).

Following the settlement of the bulk of the cases, the Judicial Panel on Multi-district Litigation assigned the nonsettling cases to Judge Miles Lord, who had been specially assigned to the Southern District of New York.[4] Subsequently, over defendants' objection, Judge Lord transferred the majority of those cases to the District of Minnesota for trial, pursuant to 28 U.S.C. §1404(a). This action was approved by the Second Circuit in *Pfizer, Inc. v. The Hon. Miles W. Lord*, 449 F.2d 122 (2d Cir. 1971).

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[3] S. Rep. No. 488, 87th Cong., 1st Sess. 1961.

[4] On making the assignment, the Judicial Panel stated:

> We are certain that Judge Miles Lord will direct discovery in such a way that pretrial in all *non-settling cases* will proceed expeditiously and efficiently and without delay or duplication. *In re Antibiotic Drugs*, 320 F. Supp. 586, 590-91 (1970).

Judge Wyatt's opinion outlines the historical background of the prior civil, criminal, and administrative proceedings. We relate some of this history here as background. Cyanamid, in late 1948, produced one of the first broad spectrum antibiotics, chlortetracycline, which it subsequently marketed under the trade name Aureomycin. Cyanamid received a patent (Duggar) on chlortetracycline in 1949 and an improvement patent (Niedercorn) in 1950.

In late 1952, Pfizer claimed discovery of tetracycline, an antibiotic said to be highly superior in some respects to other antibiotics then on the market, through dechlorination of chlortetracycline. Pfizer applied for a patent on tetracycline in late 1952; Cyanamid applied for a patent on tetracycline in early 1953. Because of the conflicting applications, the Patent Office declared an "interference." In two meetings held in November 1953, Pfizer and Cyanamid entered into an agreement by which Cyanamid would license Pfizer under the Duggar and Niedercorn patents. In addition, it was agreed that proofs of priority on tetracycline would be exchanged and that the party found not to have priority would concede priority to the other. The party receiving the patent on tetracycline would then license the other. Thereafter, on the exchange of evidence as to priority, Cyanamid conceded in February of 1954 that Pfizer's patent (Conover) represented the first discovery of tetracycline. The patent was issued to Pfizer in January 1955.

Commencing in 1954, Bristol began producing tetracycline and selling it in bulk to Squibb and Upjohn. Bristol, Squibb, and Upjohn sued Pfizer for a declaratory judgment invalidating the patent. The parties reached a settlement whereby licenses under the patent were granted by Pfizer to Bristol, Squibb, and Upjohn.

In 1958 the Federal Trade Commission, after extensive investigation, issued a complaint against the five drug companies, alleging that Pfizer had secured its patent on tetracycline by conspiracy and fraud, and that all of the drug companies were guilty of withholding material information from the Patent Office and were guilty of monopolistic practices in the production and sale of broad spectrum antibiotic drugs. This aspect of the litigation ended in 1969 without a conclusive finding of guilt, except as to misconduct of Pfizer and Cyanamid before the Patent Office. See discussion in *State of West Virginia* v. *Chas. Pfizer & Co., supra*, 314 F. Supp. at 715-18.

After reviewing the prior proceedings, Judge Wyatt observed:

> After two exhaustive and lengthy investigations by two agencies of the government, there are no findings of any misconduct by any of the defendants which would show, even prima facie, a violation of the antitrust laws. The only findings of misconduct are those by the Commission that Pfizer and Cyanamid each in substance committed a fraud on the Patent Office; the Commission, however, found that no conspiracy in this respect between Pfizer and Cyanamid had been proved before the Patent Office, our Court of Appeals has said that this is relevant to the issue of violation of the antitrust laws 'only insofar as the acts of Pfizer and Cyanamid supported an inference that at the November 1953 meetings they had entered into agreements to fix prices or to exclude others'.
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>
> Thus, in the Commission proceedings there are no findings of any misconduct by three of the defen-

> dants—Bristol, Squibb and Upjohn. As to the other two defendants, Pfizer and Cyanamid, the only finding of misconduct has to do with patent prosecutions in the Patent Office. Aside from serious questions of law about the effect of this misconduct, it would not itself constitute any violation of the antitrust laws; at best, it might arguably be some evidence of an attempt to monopolize. [314 F. Supp. at 741-42]

Judge Wyatt noted that the reversal of the criminal antitrust convictions against Cyanamid, Pfizer, and Bristol "leaves the criminal proceeding without substantial effect at this point." *Id.* at 742.[5]

The pending actions reiterate the charges made in the prior administrative and judicial proceedings that the defendants conspired to restrain interstate commerce in the manufacture, sale, and distribution of tetracycline and other broad spectrum antibiotic products and also conspired to monopolize the manufacture, sale, and distribution of those products.

II.

The Present Petition

In the instant proceedings, petitioners assert that Judge Lord, through his actions, statements, and conduct, has demonstrated personal bias and prejudice by the following:

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[5] The Supreme Court's recent affirmance of the Second Circuit's reversal of the criminal conviction, *United States* v. *Chas. Pfizer & Co., Inc.*, . . . U.S. . . . (No. 70-72, Jan. 24, 1972), has preserved the aptness of Judge Wyatt's comment upon the lack of finality of the criminal proceeding.

(1) taking aggressive action to attempt to dissuade the United States Department of Justice from settling its civil action against the defendants in an effort to assist the other plaintiffs;

(2) suggesting that the United States Government, if it were to settle its civil action, would be permitting the defendants to "buy a monopoly";

(3) declaring that: "We may have another proceeding, or, at least some moves" against defendants to vindicate the integrity of the United States Patent Office and courts for fraud on those tribunals;

(4) urging the Department of Justice to investigate the Patent Office, which he characterized as "the sickest institution that our Government has ever invented" and "the weakest link in the competitive system in America";

(5) refusing, without a hearing, to consider a settlement of the treble damage class actions at a dollar amount previously approved in these cases by another district court and the Court of Appeals for the Second Circuit, which caused one damage plaintiff to withdraw its agreement to settle for that dollar amount;

(6) soliciting law suits against defendants by urging a private attorney to find some hospital patients to form a new class of plaintiffs;

(7) interrogating a deposition witness in an aggressive and angry manner, in an attempt to intimidate the witness and to influence his testimony along lines desired by plaintiffs, suggesting openly that the witness was evasive and lying, and threatening to levy a fine; and

(8) accusing counsel for one of the petitioners of instructing his client to "manufacture" or "doctor" evidence.

III.

Mandamus as a Remedy in Recusal Cases

We turn our consideration to a determination whether mandamus may be utilized by the petitioners at this stage of the proceedings to review Judge Lord's determination not to disqualify himself. Although the authorities are not uniform, a substantial body of law supports the proposition that mandamus to a United States Court of Appeals will lie when a district judge has rejected affidavits seeking his recusal as "legally insufficient." *Compare* (mandamus appropriate): *Will* v. *United States*, 389 U.S. 90 (1967); *Pfizer, Inc.* v. *Lord*, 449 F.2d 119 (2d Cir. 1971); *Wolfson* v. *Palmieri*, 396 F.2d 121 (2d Cir. 1968); *Rosen* v. *Sugarman*, 357 F.2d 794 (2d Cir. 1966); *In re Union Leader Corp.*, 292 F.2d 381 (1st Cir.), *cert. denied*, 365 U.S. 833 (1961); *United States* v. *Ritter*, 273 F.2d 30 (10th Cir. 1959); *Minnesota & Ontario Paper Co.* v. *Molyneaux*, 70 F.2d 545 (8th Cir. 1934); *with* (mandamus inappropriate): *Albert* v. *United States District Court*, 283 F.2d 61 (6th Cir. 1960), *cert. denied*, 365 U.S. 828 (1961); *Green* v. *Murphy*, 259 F.2d 591 (3d Cir. 1958); *Korer* v. *Hoffman*, 212 F.2d 211 (7th Cir. 1954). Judge Aldrich in *In re Union Leader Corp., supra*, noted:

> From the general standpoint of 'the interest of justice,' the right to be tried before an unbiased judge is also basic in our judicial system. Although there are differences of opinion, we agree . . . that public

> confidence in the courts may require that such a question be disposed of at the earliest opportunity . . . . This need not commit us to entertaining every rejected affidavit of prejudice; nor need we presently set forth the limits. It is to be borne in mind that mandamus is a discretionary writ. [292 F.2d at 384].

We think it noteworthy that the United States, as a respondent in these proceedings, suggests that mandamus is an appropriate remedy "given the complexity, number and probable duration of the cases involved"[6] and that "rather than leave such a serious charge unresolved throughout this lengthy litigation . . . the writ may properly be used here to review Judge Lord's denial of petitioner[s'] motion."

Accordingly, we believe that mandamus is an appropriate vehicle to review Judge Lord's refusal to recuse himself.

IV.

The Standard for Recusal

Before turning to detailed examination of the claims made by the petitioners, we review the legal principles which govern the determination of this case. The applicable substantive law is contained in 28 U.S.C. §144, which reads:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has

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[6] Judge Lord himself has characterized this case as "practically the biggest single assignment ever taken on by a judge anywhere in the history of jurisprudence of any kind."

a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

The Supreme Court, in *Berger* v. *United States*, 255 U.S. 22 (1921), construed a predecessor statute to mean that, although the challenged judge may not pass upon the truth of the facts alleged in the affidavit, he may decide whether the affidavit meets the procedural requirements of the statute and whether the facts alleged give fair support to the charge of bias and prejudice. By retaining the basic provisions of this earlier statute in the present §144, Congress apparently acquiesced in the procedure whereby a challenged judge may initially pass upon the legal sufficiency of the affidavit. *See*, Note, *Disqualification of Judges*, 79 Harv. L. Rev. 1435, 1438-39 (1966); Schwartz, *Disqualification for Bias in the Federal District Courts*, 11 U. Pitt. L. Rev. 415, 423 (1950). Petitioners have raised no question concerning the procedure followed by Judge Lord in passing upon the legal sufficiency of the affidavit.

The statutory concept of "personal bias or prejudice" was explained by the Supreme Court in *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966).

> The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. [384 U.S. at 583]

In deciding whether petitioners' affidavits demonstrate this personal bias or prejudice, we accept the truth of the facts recited therein. We determine the validity of petitioners' conclusion of bias by examining the cited facts against the record presented to us.

V.

Early Incidents

The claim of bias and prejudice against Judge Lord appears to rest primarily on incidents which occurred in late August and early September 1971, although petitioners refer to Judge Lord's conduct and statements on earlier occasions as reflecting personal bias and prejudice. These early incidents provide a background against which the later remarks and comments of Judge Lord can be evaluated. We examine Judge Lord's comments chronologically but focus on the later comments.

The joint affidavit, in part, states:

> We have set forth in this joint affidavit specific incidents which we believe manifest Judge Lord's bias and prejudice. In substance these incidents show that Judge Lord has improperly assumed the role of prosecutor and advocate against defendants and has increasingly become more aggressive and open in this role....

Each affiant submits his affidavit with extreme personal reluctance. We do not assert that Judge Lord's prejudice is necessarily a deliberate or a conscious one....

While from the beginning there were indications and hints of Judge Lord's personal prejudice against and hostility toward defendants, none of these defendants believed that it was proper to take the serious step of making an application to recuse on these incidents alone. Defendants hoped that Judge Lord's appearance of bias and his prosecutorial attitude were illusory....

The extent of Judge Lord's prejudice and bias recently became clear as plaintiffs began taking depositions . . . of Harvey W. Edelblute, a patent attorney formerly employed by American Cyanamid Company, who, during the 1948-55 period, prosecuted Cyanamid's Aureomycin and tetracycline patent applications and was a participant in events leading to the patent aspects of this litigation....

(*a*)

At the request of the respondents, Judge Lord attended the first six days of Mr. Edelblute's deposition. Although there is some evidence that petitioners would have preferred that Judge Lord not be present, we feel that his presence is not critical.[7]

Petitioners claim Judge Lord manifested a biased state of mind while attending this deposition. We have reviewed this contention against a transcript of over one thousand pages in length and tape recordings of a portion of the

[7] 28 U.S.C. §1407(b) specifically contemplates the appointment of judges to preside at depositions in multi-district litigations.

deposition. We conclude from reading the transcript and listening to the tapes that much of the difficulty was caused by the compound questions asked by the attorney for the United States who interrogated Edelblute. Additionally, we note that Edelblute did not always respond directly to the questions asked, even when they were asked in a clear-cut manner.

The petitioners' affidavit cites several comments made during the deposition as proof of Judge Lord's bias:

> The Court: I will tell you one thing: At some point this witness is going to get pinned down and answer direct questions. He is a lawyer. He is a witness. He is under oath. My observation here, which I don't propose to incorporate into anything that goes before the jury, that he is acting in a very devious manner.

Later the judge threatened the witness:

> The Court: Now, that's not an answer to the question, and you are going to have to straighten out and fly right or the Court is going to impose a little fine on you.
>
> Mr. S. Murphy [Counsel for Cyanamid]: Well, Your Honor, I am going to except to that.
>
> The Court: You may except to it, and you may appeal from it. If he doesn't start answering questions, he is going to start getting fines for it.

We note that a later statement reflects an apparent change in Judge Lord's attitude toward the witness:

> The Court: You don't have to worry about the case if the man is answering questions directly. He has done very much better since we had our chat.

Although we consider some of the cited comments to be inappropriate, perhaps even unfair to the witness, we cannot say that they demonstrate any particular personal prejudice against petitioners.

Petitioners additionally allege that Judge Lord questioned Edelblute in an "inquisitorial" manner. The comments below demonstrate that the witness, who was a trained lawyer, found no objection to Judge Lord's occasional questions.

> The Court: All right. Now, I am sorry to interrupt, but sometimes a person will respond a little more directly to the Judge than to a lawyer and I am rather pleased with his answers at this point. Go ahead.
>
> The Witness: If I may say so, sir, your questions are a hell of a lot clearer than those being asked by Mr. Owens [Counsel for respondent United States].

This court has approved of a presiding judge questioning a witness in order to clarify facts and issues:

> The trial judge in a federal court is not a mere presiding officer. It is his function to conduct the trial in an orderly way with a view to eliciting the truth, and to attaining justice between the parties. It is his duty to see that the issues are not obscured, that the trial is conducted in a proper manner, and that the testimony is not misunderstood by the jury, to check counsel in any effort to obtain an undue advantage or to distort the evidence, and to curtail an unnecessarily long and tedious or iterative examination or cross-examination of witnesses. He has the authority to interrogate witnesses, and to express his opinion upon the weight of the evidence and the credibility of the

witnesses. *Fidelity & Deposit Co. of Maryland* v. *Bates*, 76 F.2d 160, 170 (8th Cir. 1935).

We see no reason why such power need be restricted to the actual trial. We think that a trial judge may comment and inquire during the course of pretrial proceedings so long as he does so in a nonprejudicial manner.

After reviewing the transcript and tapes of the Edelblute deposition, we are not impressed with the petitioners' claims that Judge Lord demonstrated personal bias and prejudice through his comments at the deposition, or by his interrogation, of Edelblute. To the extent Judge Lord's remarks can be construed to impugn Edelblute's veracity, they would seem to be prematurely made during pretrial proceedings and therefore unfair, but the remarks fail to reflect any personal bias or prejudice. This type of prejudgment, although unfortunate, cannot serve as a basis for recusing Judge Lord.

(*b*)

Petitioners also charge that Judge Lord arbitrarily rejected a proposal from the State of Hawaii that it settle its action under the so-called "Alabama plan," a formula which had been judicially approved by Judge Wyatt.* Petitioners assert that the State of Hawaii withdrew a settlement proposal made to petitioners after Judge Lord informed their attorney by telephone that the court would refuse to approve this settlement or any settlement at the "Alabama plan" level. In a letter to all parties dated

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*The Alabama plan provided for allocation and apportionment among all plaintiffs of the sum offered by petitioners to settle all claims during the time Judge Wyatt supervised this consolidated litigation. The plan is explained at 314 F. Supp. 726-30.

May 14, 1971, Judge Lord confirmed this telephone conversation and related that it would be "awkward" for him to approve the settlement on the basis of the meager information then known to him. The letter also stated that the adoption of Judge Wyatt's settlement plan would involve "an evaluation of plaintiffs' prospects" which the court was not prepared to make at that time.

Petitioners construe Judge Lord's comments as an unwarranted brushoff of a settlement proposal, reflecting bias. We note, however, that Judge Lord stated in the letter that his rejection of the proposed settlement would be "without prejudice to renewing the request at a later time." In the light of the meager information available on this issue, petitioners cannot prevail. We view with deep concern, however, any conduct or comments by the trial court which may hamper a fair settlement of any of the suits. We discuss the matter more fully in part VI of this opinion.

(c)

Petitioners also charge Judge Lord with soliciting lawsuits against them. The joint affidavit relates:

> At the pretrial conference of March 6th, while recognizing that it 'isn't the kind of a thing to spread on the record' he [Judge Lord] "urged," "invited" and "drafted" a private attorney to go out and find some hospital patients to form a class which none of the litigating plaintiffs had yet sought to represent.

Respondents dispute the accuracy of petitioners' recollection of Judge Lord's statements. Furthermore, respondents point out that Judge Lord was concerned with the

adequate representation of hospital patients as a consumer class. After consideration of all aspects of the claims of hospital patients, Judge Lord directed that they be dismissed. We have considered this comment and other similar comments referred to in petitioners' affidavit. In the light of the record, we reject the contention that such remarks, individually or collectively, manifest personal bias against petitioners.

VI.

The Proceedings of September 8, 1971

With this background, we now proceed to a consideration of a conference between court and counsel on September 8, 1971, which Judge Lord called in order to consider the "court's role" relating to the "public interest aspects" of a proposed settlement between petitioners and the United States. We deem Judge Lord's comments at this conference critical to our evaluation of the sufficiency of petitioners' charges.

Petitioners' affidavit asserts that during this conference Judge Lord displayed bias and prejudice (1) in aggressively attempting to dissuade the United States Department of Justice from consummating any settlement, thereby indicating an intent to assist the plaintiffs in the prosecution of their lawsuits; (2) in improperly implying that Edelblute had given false testimony at the discovery deposition; (3) in issuing, sua sponte, an order to show cause why certain competitor cases not then venued in Minnesota should not be transferred to that district for trial; and (4) in expressing great distrust for the United States Patent Office, thus demonstrating that he lacked the

impartiality to determine fairly whether or not petitioners had committed fraud upon the Patent Office in obtaining the Pfizer patent on tetracycline.

In evaluating these charges, we have examined the transcript of this conference. Portions of the Edelblute deposition also bear upon these issues. During the course of that deposition, Judge Lord advised the parties that he had personally called Assistant Attorney-General McLaren, in charge of antitrust matters for the Department of Justice, and had indicated special interest in the possible settlement of the government's action in Count I of its complaint which seeks cancellation of the Pfizer patent on tetracycline.[9]

In response to this request, Lewis Bernstein, Chief of the Special Litigation Section of the Antitrust Division, appeared before Judge Lord on September 8, 1971, and orally advised the court and interested counsel that the United States and the petitioners had reached a tentative agreement[10] to settle Counts II and III of the government's complaint, and that to consummate the settlement, the government contemplated dismissing Count I, which seeks cancellation of Pfizer's tetracycline patent for fraud. According to Mr. Bernstein, the proposed settlement provided that this patent would be dedicated to the public, rather than cancelled as fraudulently procured. Mr. Bern-

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[9] Judge Lord said:

> I believe I made a record of the fact that I previously had talked to Mr. McClaren on the phone and suggested to him that Count No. I was so fraught with public interest and that the very integrity of the court system seemed at stake assuming prima facie that the allegations are established and the courts of this nation have been imposed upon, and for that reason I wanted to confer with him before he made any settlement . . . .

[10] The tentative agreement provided that Counts II and III would be settled for approximately fourteen million dollars.

stein also stated that, since the other plaintiffs had relied upon the Department of Justice in developing the patent aspects of the litigation, the government would make available to plaintiffs all information it had gathered on that issue.

In response, Judge Lord expressed concern whether the public interest would be served by the dismissal of Count I and also expressed his displeasure at having his "game plan" upset by the settlement:

> I don't believe in making speeches for the record that do not truly reflect my feelings on the subject. I deliberately combined the states cases with the Federal case on the theory that it might save us a multiplicity of trials. I was fully aware of the fact that Count 1 in equity was to be tried by the Court and we could try it with reasonable dispatch. For that very reason I sat in on Mr. Edelblute's, or a great portion of Mr. Edelblute's deposition testimony so that I could get some gauge of credibility, to kind of place the case and get the feel of it and see what it was that Mr. Owens was driving at.
>
> All of these things have gone by the boards if you settle this case. You not only in effect give the plaintiffs an added burden of trying your case, but you upset the "game plan" which the Court, after a good deal of consideration and deliberation set as a means of disposing not only of the cases with which I was combined, but all of these cases in one proceeding.

Judge Lord added:

> This, as you know, Mr. Bernstein, has got to be practically the biggest single assignment ever taken

> on by a judge anywhere in the history of jurisprudence of any kind. So, if I have been guilty of trying to figure out a way where I could get at the key issues and dispose of them, I plead guilty to that. It stings me just a little bit when the rug is pulled out from under me and I now face considerable more work to get rid of this mountainous litigation. I am just human enough so that I feel very badly about my friends who are defending this case when I have to lean this way and indicate to them that I would find a shorter way of resolving it that might not work to their advantage because I know they would want a jury to do it rather than have me do it. But I would do what the law provides in that regard.

Petitioners also take umbrage at Judge Lord's comments upon Edelblute's testimony at the September 8th proceedings. Judge Lord stated:

> . . . . However, I am not unmindful of the fact that fraud on the Patent Office is here alleged and that for about seven days Mr. Harvey Edelblute sat on the witness stand and with all of the power at his disposal as a consultant and employee of the defendant corporation Cyanamid, he alleged that nothing which he did or said constituted fraud despite the holding of the FTC and the grand jury.

Finally, during the exchange with Mr. Bernstein, Judge Lord turned his attention to a possible relationship between the United States Attorney General and the Patent Office, suggesting:

> I think you ought to tell your Attorney General, if he wants to look at something, he ought to look at

> that Patent Office. That has got to be the sickest institution that our Government has ever invented. It is just, as far as I can see, an attritional war between the patent applicant and the patent examiners, who apparently get paid on the piece work for how many patents they could put out. And you can examine for months some poor fellows that are out doing business and finally arrive at a price structure, and you might get an antitrust suit. But if you want to look, go back and look in your Patent Office and see what is happening to the Patent Office. I say that for the record and for posterity. That has got to be the weakest link in the competitive system in America.

The record manifests Judge Lord's obvious perturbation over the contemplated settlement. His words were strong. Yet his ire seems directed not at petitioners but at the government, which, according to Judge Lord, might be selling out the public interest.

We think it clear that Judge Lord misconceived his role vis-a-vis the settlement. Petitioners assert that a district judge lacks the power to approve or disapprove any proposed settlement between the government and the defendants. *See Confiscation Cases*, 7 Wall. 454 (1868); *Ex Parte American Steel Barrel Co.*, 230 U.S. 35 (1913). We have been shown no authority to the contrary.

We note, however, that the court's remarks concerning the public interest in the settlement of Count I rested upon Judge Lord's assumption, frequently stated in the record, that the government prove the truth of its allegations. Moreover, Judge Lord's concern over the upsetting of his "game plan" in managing the litigation may have

been better left unsaid, but that statement does not manifest any personal bias and prejudice toward petitioners.

We find Judge Lord's remarks suggesting that the Attorney General ought to look at the Patent Office, "the sickest institution . . . ever invented," to be totally injudicious. These words should not have been spoken, and we wholly disapprove of them. Nevertheless, even if we accept petitioners' arguments that these comments disclose a prejudicial attitude concerning the relationship between petitioners and the Patent Office, these observations may have come as a result of Judge Lord's exposure to the prior proceedings and the facts disclosed during the pretrial proceedings. Thus, although Judge Lord's comments were gratuitous and wholly extraneous to the question then before him, we cannot say that they reflect an "extrajudicial bias" as is required for recusal under *Grinnell, supra.*

Because Judge Lord's conduct and comments may have discouraged settlements between the parties, we add a word of admonition to the litigants and to the District Judge. This complex and difficult litigation places unusual burdens upon an already overburdened federal court system and upon the very busy District Court for the District of Minnesota. Respondents have described the task of Judge Wyatt, who preceded Judge Lord in the handling of these cases, as "awesome." The Second Circuit has referred to the "sizeable judicial resources" already consumed by this litigation. *Pfizer Inc. v. Lord, supra,* 449 F.2d 119, 121.

This court is well aware that Judge Lord has expended great energy over many months in the management of these cases and in his effort to complete pretrial discovery. Yet, after all of this, months of trial may still lie ahead

and years may elapse before all the threads of this litigation are unraveled. The incidents giving rise to these lawsuits occurred almost twenty years ago. We think there is much to be said in the public interest for the parties arriving at an amicable settlement without interference by the court. We think those parties to this litigation who may seek fair settlement deserve the approbation of the courts.

In reviewing the explanation given by Mr. Bernstein relating to the proposed settlement between the United States and petitioners, we particularly note that the proposed settlement requires the dedication of the patent to the public, and that, notwithstanding any settlement, government attorneys will make available to the other plaintiffs pertinent data relative to the claim of patent fraud. While other plaintiffs may prefer that the government continue its participation in this lawsuit, they may not demand it. We think it appropriate to state our view that we believe fair settlement of any of the plaintiffs' claims, including the claims of the United States, will likely promote the overall public interest. Conversely, any action of Judge Lord which discourages fair settlements will contravene the public interest.

In holding Judge Lord's actions to this point concerning the proposed settlements to be nonprejudicial, we are mindful that Judge Lord needed adequate time to familiarize himself with the case before encouraging the parties actively to seek settlement. We trust that he possesses the requisite knowledge and information at this time to pass promptly upon settlement proposals that may be submitted to him for approval. The policy of the law encourages compromise to avoid the uncertainties of the

outcome of litigation as well as the avoidance of wasteful litigation and expense incident thereto. In light of the record presented to us, we think it appropriate to direct Judge Lord not to impede any fair settlement of any of the cases presently before him. This direction applies both to the government's proposed settlement and to any settlement reached by petitioners and any of the other plaintiffs.

We think it advisable for the benefit of the District Court and counsel to repeat here Judge Wyatt's analysis of factors to be considered in evaluating any settlement, an analysis approved by the Second Circuit:

> Whether to approve the compromise involves an exercise of discretion. The Court is responsible for the protection of the many class members whose interests are involved but who do not appear in the action. Approval should be given if the settlement offered is fair, reasonable, and adequate. These terms are general and cannot be measured scientifically.
>
> The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement. This factor is sometimes referred to as the likelihood of success. The Supreme Court directs the judge to reach "an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated" and to "form an educated estimate of the complexity, expense, and likely duration of such litigation. . . . and all other facts relevant to a full and fair assessment of the wisdom of the proposed compromise". The Supreme Court then emphasizes: "Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely

rewards of litigation." The quotations are from Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424-425, 88 S. Ct. 1157, 20 L.Ed.2d 1 (1968). [440 F.2d at 1085 quoting 314 F. Supp. 740-41]

VII.

Conclusions

We have reviewed Judge Lord's comments and his actions and have evaluated them against circumstances disclosed in cases in which appellate courts have forced a judge to recuse himself or reversed a judgment because of demonstrated bias. In *Berger* v. *United States*, 255 U.S. 22 (1921), the affidavit was held to be sufficient because of the openly espoused anti-German animus of the trial judge. *Cf. Tumey* v. *Ohio*, 273 U.S. 510 (1927). In *United States* v. *Hatahley*, 257 F.2d 920 (10th Cir.), *cert. denied*, 358 U.S. 899 (1958), the trial judge was openly biased in favor of the plaintiff Indians and "[a] public appeal in behalf of the plaintiffs was made for funds and supplies to be cleared through the Judge's chambers." *Id.* at 926. *See also, e.g., Peacock Records, Inc.* v. *Checker Records, Inc.* 430 F.2d 85 (7th Cir. 1970); *Knapp* v. *Kinsey*, 232 F.2d 458 (6th Cir. 1956); *Whitaker* v. *McLean*, 118 F.2d 596 (D.C. Cir. 1941). The facts contained in petitioners' affidavit fall short of showing the bias and prejudice needed to recuse.

We recognize that advocates construe statements of a trial judge in a somewhat partisan light and thus magnify the impact of any comment of the court, whether it be

favorable or critical.[11] A trial judge, unless he carefully weights his pretrial comments, may very well leave the impression that he has improperly prejudged the case, a situation which seems to have occurred here. It is important that the litigant not only actually receive justice, but that he believe that he has received justice. A judge, like Caesar's wife, should be above suspicion.

Finally, we must consider respondents' motion for damages. We initially observe that this is a close case. We are convinced of petitioners' sincerity and good faith in filing their affidavits even though we have ruled adversely to their contentions. Clearly, some of Judge Lord's remarks have unnecessarily shaken petitioners' confidence in his impartiality. Accordingly, we deny respondents' motion for damages and costs.

Although we deny the petition for recusal, we add a caveat. This record adversely reflects upon Judge Lord's conduct during the pretrial proceedings. Reluctantly, we have pointed out his shortcomings in this case. We demand of Judge Lord, as we do of every trial judge in this circuit, a high standard of judicial performance with particular emphasis upon conducting litigation with scrupulous fairness and impartiality. We commend to Judge Lord the Socratic definition of the four qualities required of every judge: to hear courteously; to answer wisely; to consider soberly; and to decide impartially.

These cases will continue under Judge Lord's aegis. We expect him to provide an impartial forum in compliance

---

[11] Petitioners' assertion that Judge Lord has unjustifiably attacked the integrity of defense counsel falls into this category. The remark attributed to Judge Lord that "it would not bother me to find that lawyers were part of the conspiracy" does not directly cast any aspersions upon defense counsels' integrity, but we recognize that this cryptic remark might be so interpreted.

with his judicial obligation. If petitioners' fears that they will not be afforded a fair trial should prove justified, they are not left without an appropriate remedy. *See, e.g., Rosen* v. *Sugarman, supra,* 357 F.2d at 798; *In re Union Leader Corp., supra,* 292 F.2d at 389.

Petition denied. The parties shall bear their respective costs.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

IN RE COORDINATED PRETRIAL PROCEEDINGS IN ANTIBIOTIC ANTITRUST ACTIONS	4-71 Civ. 435 and the following actions:

4-68 Civ.409 4-71 Civ.403 4-71 Civ.420
4-68 Civ.411 4-71 Civ.404 4-71 Civ.421
4-69 Civ.458 4-71 Civ.405 4-71 Civ.422
4-69 Civ. 75 4-71 Civ.406 4-71 Civ.423
4-68 Civ.410 4-71 Civ.407 4-71 Civ.424
4-71 Civ.6 4-71 Civ.408 4-71 Civ.425
4-71 Civ.392 4-71 Civ.409 4-71 Civ.426
4-71 Civ.393 4-71 Civ.410 4-71 Civ.427
4-71 Civ.394 4-71 Civ.411 4-71 Civ.428
4-71 Civ.395 4-71 Civ.412 4-71 Civ.429
4-71 Civ.396 4-71 Civ.413 4-71 Civ.430
4-71 Civ.397 4-71 Civ.414 4-71 Civ.431
4-71 Civ.398 4-71 Civ.415 4-71 Civ.432
4-71 Civ.399 4-71 Civ.416 4-71 Civ.433
4-71 Civ.400 4-71 Civ.417 4-71 Civ.434
4-71 Civ.401 4-71 Civ.418
4-71 Civ.402 4-71 Civ.419

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

IN RE COORDINATED PRETRIAL PROCEEDINGS IN ANTIBIOTIC ANTITRUST ACTIONS	M-19-93A and the following actions:

69 Civ. 1000
70 Civ. 180
69 Civ. 4091
70 Civ. 1605
69 Civ. 1315
68 Civ. 4235
70 Civ. 877

DEFENDANTS' JOINT MOTION AND APPLICATION

Defendants Pfizer Inc., American Cyanamid Company, Bristol-Myers Company, Squibb Beech-Nut, Inc. and The Upjohn Company hereby move and apply that the Honorable Miles W. Lord proceed no further and recuse himself as judge in all of these actions on the ground that he bears such bias and prejudice

against defendants as will substantially prejudice defendants' rights to a fair trial. This joint application and motion for disqualification is pursuant to and based upon the Fifth Amendment to the Constitution of the United States and 28 U.S.C. Sec. 144, the record of all prior proceedings had in these actions, the annexed affidavits of Edmund T. Pratt, Jr., Executive Vice President of Pfizer Inc., Harold B. Gross, Secretary and General Counsel of American Cyanamid Company, Frank A. Sprole, Vice President and head of the Legal Division of Bristol-Myers Company, Ross Reid, Vice President and General Counsel of Squibb Beech-Nut, Inc., Gerard Thomas, Vice President, Secretary and General Counsel of The Upjohn Company, the annexed joint affidavit of counsel, and the defendants' Joint Memorandum submitted herewith.

Dated: September 17, 1971.

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UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

IN RE COORDINATED PRETRIAL PROCEEDINGS IN ANTIBIOTIC ANTITRUST ACTIONS	:	4-71 Civ. 435 ALL ACTIONS

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

IN RE COORDINATED PRETRIAL PROCEEDINGS IN ANTIBIOTIC ANTITRUST ACTIONS	:	M-19-93A ALL ACTIONS

JOINT AFFIDAVIT

JULIAN O. VON KALINOWSKI, ROBERT E. COOPER, JOHN W. THOMAS, PETER DORSEY, SAMUEL W. MURPHY, JR., MERRELL E. CLARK, JR., ROBERTS B. OWEN, ALLEN F. MAULSBY, JOHN D. FRENCH, GORDON D. BUSDICKER and LAWRENCE W. HAYES being duly sworn, each individually and jointly depose and say:

1. Each of affiants is an attorney who has represented one of the defendants herein (Pfizer Inc., American Cyanamid Company, Bristol-Myers Company, Squibb Beech-Nut, Inc., and The Upjohn Company) in the proceedings had in these actions before the Honorable Miles W. Lord. Each affiant has personal knowledge of some of the facts stated herein and information and belief of the remainder thereof, but each is familiar with the events which have transpired in these proceedings and the circumstances in which they have taken place, including the demeanor and attitudes as well as the words of Judge Lord. Each submits this

affidavit in support of defendants' joint application and motion requesting that the Honorable Miles W. Lord recuse himself from proceeding further as Judge in these actions.

2. This complex litigation now involves 56 of the more than 150 antitrust treble damage actions which were brought by a number of different categories of plaintiffs including states, wholesalers and retailers, insurance companies, private hospitals, agricultural purchasers and competitors, each alleging that defendants conspired in violation of the Sherman Act to exclude competition and fix prices in the broad spectrum antibiotic drug market. Many of these cases were brought as class actions and have been permitted to proceed on that basis. In addition, the United States has sued for single damages arising from its purchases of defendants' products and for cancellation of Pfizer's Conover patent covering product and process claims on the broad spectrum antibiotic drug tetracycline. Until recently, all the cases, originally filed in judicial districts throughout the country, were pending in the Southern District of New York for pretrial proceedings pursuant to 28 U.S.C. § 1407. A majority of these cases were settled, including suits of 43 of 50 states, private hospitals, Blue Cross, wholesalers and retailers, pursuant to offers totaling $132,500,000 which had been made by defendants. These settlements were approved by Judge Inzer B. Wyatt (who had presided over pretrial proceedings in all the cases until Judge Lord's assignment by the Judicial Panel on Multidistrict Litigation to the "litigating cases" in December of 1970) and also by the Second Circuit Court of Appeals. Most of the remaining cases have been transferred by Judge Lord to the District of Minnesota for trial pursuant to 28 U.S.C. § 1404(a) or, in the few instances where cases were originally filed there, are being remanded to that District.

3. Each of the affiants has concluded on the basis of his personal experience in these proceedings, and on information and belief, that Judge Lord possesses, and has possessed from the outset, such prejudice against defendants that it will be impossible for him to preside over further pretrial proceedings or at trial of these actions in such fair, equitable and judicious manner as the law and fundamental concepts of due process require. Moreover, each of the affiants has similarly concluded that Judge Lord possesses such prejudice against defendants that it would be impossible for him to perform fairly such judicial functions as might ever be required in these actions under Rule 23(e) in the event of settlement:

4. We have set forth in this joint affidavit specific incidents which we believe manifest Judge Lord's bias and prejudice. In substance, these incidents show that Judge Lord has improperly assumed the role of a prosecutor and advocate against defendants and has increasingly become more aggressive and open in this role. In addition, our individual observations of Judge Lord's demeanor during these proceedings form an important part of our conclusions about his prejudice, and they have contributed to our conviction that it is impossible for Judge Lord fairly to preside either over further pretrial proceedings -- including any hearing pursuant to F.R. Civ. P. 23(e) -- or at trial.

5. Each affiant submits this affidavit with extreme personal reluctance. We do not assert that Judge Lord's prejudice is necessarily a deliberate or conscious one. All of us have some deep-seated feelings of which we are unaware, and we respond to their powerful forces without knowing it. But defendants' rights to a fair trial will be imperiled by any such prejudice.

6. These actions are of great importance to defendants. Serious and far reaching charges of wrongdoing have been made, and the claims for money damages involve extremely large sums. Because many of the actions are being maintained as class actions -- some on behalf of untold millions of individual consumers -- trial of these actions will adjudicate the rights between many millions of individuals, business entities, and governmental institutions and the defendants. Whatever litigation goes forward will be extremely lengthy, complex, time-consuming and costly for all concerned. Accordingly, it is extremely important that defendants be assured of a fair trial before a fair and impartial tribunal.

7. Defendants are compelled to make this application now; they could not have fairly done so earlier. While from the beginning there were indications and hints of Judge Lord's personal prejudice against and hostility toward defendants, none of the defendants believed that it was proper to take the serious step of making an application to recuse based on those incidents alone. Defendants hoped that Judge Lord's appearance of bias and his prosecutorial attitude were illusory. Events which have occurred in recent weeks have made Judge Lord's attitudes and sentiments in this litigation clear, and have necessitated recourse to this application.

8. The extent of Judge Lord's prejudice and bias recently became clear as plaintiffs began taking depositions. On August 18, 1971 the deposition commenced of Harvey W. Haelblute, a patent attorney formerly employed by American Cyanamid Company who, during the 1948-55 period, had prosecuted Cyanamid's Aureomycin and tetracycline patent applications and was a participant in events relating to the patent aspects of this

litigation. Plaintiffs insisted that Edelblute's deposition be held before Judge Lord. Through the first six days of the deposition, despite defendants' objection, Judge Lord attended each session and exhibited a strong and, we believe, extraordinary personal interest in the testimony. Mr. Edelblute, who left Cyanamid's employ in 1958 and is now retired and more than sixty years of age was called upon to testify to the details of complex matters which had occurred fifteen to twenty-five years ago. He was severely handled by Judge Lord. On numerous occasions, Judge Lord interrogated the witness, often in an aggressive and angry manner. He suggested openly that the witness was lying, repeatedly criticized Mr. Edelblute's manner of responding, and on one occasion threatened to levy a fine. Furthermore, Judge Lord suggested areas of inquiry and leads to follow for the benefit of plaintiffs' counsel, a trial attorney from the Department of Justice.

Although the transcript does not reveal either Judge Lord's fervor or tone of voice in his interrogation of this pretrial witness, the transcript does establish the utilization of high office to serve as an advocate for plaintiffs and to intimidate Mr. Edelblute in an attempt to influence his testimony:

> "THE COURT: I will tell you one thing: At some point this witness is going to get pinned down and answer direct questions. He is a lawyer. He is a witness. He is under oath. My observation here, which I don't propose to incorporate into anything that goes before the jury, that he is acting in a very devious manner. (Tr. Vol. II at 214)
>
> * * *
>
> "THE COURT: You see, my admonition to you was not fear. Three of four times, you have made what you call misstatements, and I have done nothing about it, but when you refuse to answer a direct question, and when you try and avoid the question or give an answer to a question that wasn't asked, you are going to hear from me here and now. If at a later time somebody comes up and proves you lied here, you will hear from me then. If you just give your best estimate and your best judgment on these

things, that is all that is required of you. You are not supposed to sign an oath in blood on everything. Do your best now. (Tr. Vol. II at 258-59)

* * *

"THE COURT: Well, I think he might be spoiling a good witness for the trial by going through this, but that is his business. I don't mean to criticize you, Mr. Owens.

"MR. OWENS [counsel for the United States]: I am sorry, I didn't hear it if it was criticism.

"THE COURT: I am just saying that much of this might be education to Mr. Edelblute, but that is the chance we take. (Tr. Vol. II at 270)

* * *

"THE COURT: Now, that's not an answer to the question, and you are going to have to straighten out and fly right or the Court is going to impose a little fine on you.

"MR. S. MURPHY [counsel for Cyanamid]: Well, Your Honor, I am going to except to that.

"THE COURT: You may except to it, and you may appeal from it. If he doesn't start answering questions, he is going to start getting fines for it.

"MR. S. MURPHY: May I have that question read back then?

"THE COURT: Yes. He understands it. You understand it, and I understand it.

"MR. S. MURPHY: No, Your Honor, I do not.

"THE COURT: All right, read the last four or five remarks back.

(The last few questions and answers were read by the reporter.)

"THE COURT: He knows that that is a wrong answer, and we all know it is a wrong answer.

"MR. S. MURPHY: I suggest, Your Honor, that it is not a wrong answer.

"THE COURT: It doesn't strike me as being right Ask it again. We will try again. (Tr. Vol. II at 253-54)

* * *

"THE COURT: I think that is the best answer you are going to get out of him as along as he keeps contradicting himself. So, why don't you just go

along. I submit that he has contradicted himself by telling us about a whole page of mutants that produced more.

"MR. S. MURPHY: I submit, Your Honor, he has not. Of course, the transcript will show what it shows. (Tr. Vol. I at 154)

* * *

"THE COURT: Now, I did cut you off, Mr. Owens. I really don't mean to cut you off, but it is obvious that he is going to come out a little different answer every time, so don't you have the meat of it now? (Tr. Vol II at 219)

* * *

"THE COURT: When you get into this area of co-production there are many, many documents which I have no way of knowing what the government or the plaintiffs might have seen. But you want to remember what the material that is available that shows what you really did see is available to the Court and will soon be available to the plaintiffs and you better judge your answers accordingly because I would hope that at this point we would get right down to business. And if there are some admissions you have to make you just have to make them.

If you don't make them and if the Court is satisfied you should have made them we will deal with that later. (Tr. Vol. IV at 161)

* * *

"THE COURT: On this particular one, my recollection is that he had considerable time to review it during the proceeding and I am very troubled by this witness' recalcitrance. When he is in the mood, he can go along and tell you what a document is. When he is out of the mood, you can't get anything out of it, and I am not sure it would help him to give him the documents in advance. I go somewhat by what is happening here.". (Tr. Vol. IV at 255)

Two examples of Judge Lord's interrogation of Mr. Edelblute show that the interrogation was conducted in a manner designed to cajole or intimidate the witness into testifying to the conclusion which Judge Lord and plaintiffs desired:

"THE COURT: Now, what was the reasonable basis?

"THE WITNESS: That these fermentation liquors are unstable and they will not -- unless special precautions are taken they will change their composition in very short order after the fermentation has been completed.

"THE COURT: Well, now, let me interrupt. Didn't your answer running from "Obviously, the fermentation liquors that have been produced" down to where you say "no tetracycline was found" -- wasn't that just one big broad assumption?

"THE WITNESS: Yes, I suppose that is correct.

"THE COURT: It really wasn't based on real genuine investigation and scientific knowledge, was it?

"THE WITNESS: No, except that I had seen a report, I am sure, in which they said no other antibiotic had been found in these particular liquors, which I don't know anything about -- probably even then --

"THE COURT: If you had had the shoe on the other foot and were trying to prove prior production of tetracycline, you wouldn't have answered this the same way, would you?

"THE WITNESS: Well, obviously not. (Tr. Vol. IV, p. 171)

* * *

"MR. DORSEY: But, at any rate, it seems to me that a question from the Court in the form of your question which was clearly a leading question --

"THE COURT: It was.

"MR. DORSEY: -- to ask him whether or not his conclusions weren't based some broad general assumption is much more calculated to lead to the answer which the Court wants, an affirmative answer than would a similar question from Counsel.

And I don't know quite what the objection should be, but I would like to note our objection to that question.

"THE COURT: That is something we can adjust later. But the Witness is so adversary and so overly cautious and so, as it were, obtrusive, such an obfuscator, I really lose patience waiting around for him to answer a direct question.

"MR. DORSEY: Well, that's obvious, I think.

But let me say this: that an answer to the -- I think what he was saying in answer to your question was the assumption was since no other antibiotic was found you could therefore assume that tetracycline, which was an antibiotic, wasn't found. That wasn't obvious in his answer and that you didn't give him a chance to make that.

"THE COURT: Mr. Dorsey, that might be. Since he didn't look and find and know about it -- he says he didn't -- whether or not he is telling the truth about that, of course, remains to be seen. But sometimes I get a little confused at whose documents I am looking at. But someplace in the documents that are evidences are probably quite contrary to that. If he looked he could have found. And the question then is: can you go to the patent [sic] office blindfolded and say "It is all black out there"? (Tr. Vol. IV, pp. 174-175)

* * *

"THE COURT: Let me ask a question. Mr. Watson said that you should submit one of your best strains and you should "by no means attempt to hoodwink anyone by placing on file a dead or weak culture or one that gives very low yields of aureomycin. The mold should of course be the one that is described by us in our patent application and which produces satisfactory yields of aureomycin."

"THE WITNESS: Right

"THE COURT: Mr. Malcolm says he is a bit weak on biology as related to microorganisms, which meant, did it not, that Mr. Malcolm didn't follow Mr. Watson's advice?

"THE WITNESS: Well, he, Dr. Malcolm, I think, was upset by the --

"THE COURT: Answer my question.

"THE WITNESS: Yes.

"MR. COOPER: Your Honor, I want to object to the question. That calls for, I think, Mr. Malcolm's state of mind. Or does it relate to some conversation?

"THE COURT: It relates to how he read this document.

And what did he answer? He didn't follow Mr. Watson's advice, did he?

"THE WITNESS: No." (Tr. Vol. I, 165)

At the September 8, 1971 pretrial hearing, Judge Lord made the following statement concerning his views of Mr. Edelblute's testimony:

> "THE COURT: However, I am not unmindful of the fact that fraud on the Patent Office is here alleged and that for about seven days Mr. Harvey Edelblute sat on the witness stand and with all of the power at his disposal as a consultant and employee of the defendant corporation Cyanamid, he alleged that nothing which he did or said constituted fraud despite the holding of the FTC and the grand jury.
>
> "I suppose I am going to stop talking very shortly now but I am deeply troubled by what I see." (Tr. at 61)

Judge Lord's expression of disappointment that Mr. Edelblute did not admit the commission of a fraud shows the extent to which he prejudged important issues in these cases.

9. Judge Lord has taken aggressive action to attempt to dissuade the United States Department of Justice from settling its civil action against the defendants, in an admitted effort to assist the other plaintiffs.

The defendants had been engaged in lengthy negotiations with the Department of Justice in an attempt to settle the United States action. Recently an understanding was reached as to the terms of a settlement which we understand the Assistant Attorney General of the United States, Richard W. McLaren, intends to recommend to the Attorney General of the United States. When Judge Lord became aware of the understanding he contacted Assistant Attorney General McLaren for the apparent purpose of dissuading the Department of Justice from proceeding with the settlement, although Judge Lord had no authority over the settlement, nor indeed was it before him in any form or fashion. Regarding that telephone conversation, Judge Lord subsequently (on August 25, 1971) stated on the record that:

> "I believe I made a record of the fact that I previously had talked to Mr. McLaren on the phone and had suggested to him that count number

> l was so fraught with public interest and that the very integrity of the Court system seemed at stake assuming prima facie that the allegations are established then the courts of this nation have been imposed upon, and for that reason I wanted to confer with him fore he made any settlement, and I actually at that time had considered the advisability of doing as Judge Davies did down in Little Rock when he got in trouble with his school problem, actually appointing the Federal attorneys to handle that aspect of it which had to do with the fraud committed on the court." (Edelblute Tr. Vol. V at 417)

On August 24 and August 25 during the Edelblute deposition, the Judge was openly critical of the prospective settlement of the United States case, expressing his view that the Government should not be allowed to drop its suit (Edelblute Tr. Vol. IV at 219-22, 247; Vol. V at 403, 417) and going so far as to suggest that he would not let the Government out (Edelblute Tr. Vol V at 447).

On those occasions; Judge Lord stated "I am interested in having the Government stay in these cases" because "Count I has public interest in it." (Edelblute Tr. Vol. IV at 221) Judge Lord observed that he believed the Government had made a "thoroughly substantial prima facie case that certain of these patents were fraudulently obtained," (Edelblute Tr. Vol. IV at 418) and that "There is an indication at this point that several of the defendants were privy to that fraud, prima facie again." (Edelblute Tr. Vol. IV at 419)

Judge Lord continued:

> "Well, so we may have two proceedings. We may have one proceeding to void the patents ab initio, where the Government has already asked for that. We may have another proceeding, or, at least, some moves toward the end that something should be done to vindicate the integrity of the judicial system.
>
> "I am rather disturbed by what I see by way of

> procedures in the Patent Office, and I am also disturbed by the fact that if the Government's decision to settle this case is based upon the payment of money, then they should never have brought Count I in the first place, and if they settle Count I for the payment of money on Counts 2 and 3, then it's possible here in America to buy a monopoly. And that disturbs me. I am not sure that is the way our country works." (Edelblute Tr. Vol. IV at 421, 422)

At a pretrial conference on September 2, 1971, Judge Lord again raised the question of the United States Government settlement, but on that occasion he openly expressed his overriding concern that the remaining plaintiffs would be adversely affected if deprived of the help of the Antitrust Division's adversary skills and resources:

> "THE COURT: You see, I recognize the problem that would be created by the government settling now. . . .
>
> * * *
>
> . . . So what is the Attorney General doing if he proposes to settle this case? He is saying: 'You can do what you want to in the Patent Office, even though we have a prima facie case'; and he is saying if the states come in, and court after court has stated that the reason for allowing the longer statute of limitations is to allow the government to lead the way in antitrust cases, because of the peculiar ability that the government has, the incisive way they have of getting at the facts; here we have both of those reasons, and apparently the Justice Department wants to blow them both out of the water." (Tr. at 43-45)

At Judge Lord's request, Lewis Bernstein, Chief of the Special Litigation Section of the Antitrust Division, appeared on September 8, 1971, before the Court to respond to the Court's inquiry regarding the prospects of a settlement of the United States case. Judge Lord questioned Mr. Bernstein in an attempt to dissuade the Government from effecting the settlement:

"THE COURT: Now, I don't want to argue with you, but let me ask you this. When you filed Count 1, didn't you think you had a prima facie case?

"MR. BERNSTEIN: Yes, your Honor.

"THE COURT: Have you developed any new evidence along that line?

"MR. BERNSTEIN: We have developed evidence so that we believe that our case is strong.

"THE COURT: Did you think the public interest required you to file Count 1 when you filed it?

"MR. BERNSTEIN: Yes, Your Honor.

"THE COURT: What has changed about the public interest? Disregard Counts 2 and 3 and tell me what factors have changed concerning the interest of the public in this language, and let me at this point read to you some language I know you are very familiar with, but I want anybody who [is] reviewing this record to know what it was when somebody said Judge Lord was prejudiced, Judge Lord became an advocate, Judge Lord became overzealous."

* * *

". . . Well, many of these cases were brought in '54 and '55, in this, the Southern District of New York, and I read this language to you for the purpose of getting your explanation. And again it is entirely an executive province and an executive prerogative to decide, but it would be interesting, I think, here, on the record, to say what it is that has prompted the Department of Justice to say that only a few short years ago it thought it had a great deal of justification for proceeding to cancel these patents, that it had a legal basis for it, that the public interest demanded it, and this was the posture of the Department of Justice, and now to say, when your case is, as you say, stronger, that you have more evidence, that you should not proceed to do that. I really believe that there is a very great question as to whether I could or should require you to proceed, but it would be of great interest, I think, and not only of academic interest, but it would be interesting to know why you now feel that you were wrong in your original assessment of this case." (Tr. at 30-33)

* * *

"That is all well and good except your first statement, that the defendants were tying the settlement, the delivery of the money, to a dismissal of

> the public interest count, number 1. I just want you to think about it. It is a problem that I have not been able to satisfactorily rationalize. It is, as I have said before, something like using a criminal prosecution to collect a civil debt; then canceling the criminal prosecution after the debt is paid. Or, on the other hand, it might be analogous to buying a monopoly. Either one of them are not quite consistent with what we ordinarily think of as being the duty of a litigant or of a law enforcement official." (Tr. at 45-46)

Although Judge Lord's professed interest in the Government settlement related only to Count I (an action against Pfizer only to cancel its tetracycline patent) (Edelblute Tr. Vol. IV at 221) he also demanded that the Government advise him when the conspiracy alleged in another count ended:

> "I would appreciate your written submission to include your conclusion as to when this conspiracy ended, and to buttress up your argument that all is corrected by now settling in the manner you have described." (9/8/71, Tr. at 69)

Judge Lord's introductory statements at the September 8th hearing expressed concern "whether or not [the government's withdrawal] in fairness to the other litigants [clearly not including the defendants] . . . is appropriate at this time" (Tr. at 5). Thereafter, the Court stated:

> "I think men like the leaders of the Plaintiffs National Steering Committee who are here, or Bob Murphy, the Assistant Attorney General from California, or Mr. Benoy from North Carolina, or any of these other gentlemen, -- Mr. Nugent -- would be helpless to go through these aspects of the documents [the patent aspects]. I just don't think they are that much better than I am at this field." (Tr. at 50)

Judge Lord further advised government counsel as to the effect the proposed United States settlement would have on the "game plan" as devised and being followed by him for disposition

of the pending litigation:

"THE COURT: Let me just make another little statement here so we don't have any area of mistake or mystery about what has motivated the Court in doing exactly what I have done.

I don't believe in making speeches for the record that do not truly reflect my feelings on the subject. I deliberately combined the states cases with the Federal case on the theory that it might save us a multiplicity of trials. I was fully aware of the fact that the Count 1 in equity was to be tried by the Court and we could try it with reasonable dispatch. For that very reason I sat in on Mr. Edelblute's, or a great portion of Mr. Edelblute's deposition testimony so that I could get some gague of credibility, to kind of pace the case and get the feel of it and see what it was that Mr. Owens was driving at.

All of these things have gone by the board if you settle this case. You not only in effect give the plaintiffs an added burden of trying your case, but you upset the 'game plan' which the Court, after a good deal of consideration and deliberation set as a mean of disposing not only of the cases with which I was combined, but all of these cases in one proceeding.

If it were going to come out to take the patent issue of these cases and then to turn the thing around, and if there was an invalidity of the patent just go ahead on the Walker process doctrine and handle the antitrust aspects of it.

I cannot honestly say that you will not multiply many times the problems that the Court has in handling this litigation. If I were to have found that the patent was valid and it was not obtained by fraud, the patent aspect would also go out the window and they would be put to their antitrust case without the Walker process aspect entering into it at all.

Now I say that on the record so that you hear, and you good gentlemen who are representing the defendants and feel put upon by the Court, know exactly what it is that I am talking about and what motivated me." (Tr. 40-42)

During the September 8 hearing, Judge Lord sua sponte issued an oral order to show cause why the competitor cases should not be transferred under 1404(a) to Minneapolis for trial. (Tr. at 67) Inasmuch as these cases had previously been transferred to Judge Lord for all pretrial purposes, it would appear that Judge Lord issued this order to show cause because he wanted the other plaintiffs to have the help at trial of one of the counsel for the competitor plaintiffs, whom Judge Lord regards as an experienced patent litigator. (9/2/71, Tr. at 40-41)

At the same session Judge Lord also expressed strong views regarding the role and competency of the Patent Office, and its effect on competition, which in and of itself evidences a prejudice which, given the issues of these cases, would make it impossible for defendants to have a fair trial:

> "I think you ought to tell your Attorney General if he wants to look at something he ought to look at that Patent Office. That has got to be the sickest institution that our Government has ever invented. It is just as far as I can see an attritional war between the patent applicant and the patent examiners who apparently got paid on the piece work for how many patents they could put out. And you can examine for months some poor fellows that are out doing business and finally arrive at a price structure and you might get an antitrust suit [sic]. But if you want to look, go back and look in your patent Office and see what is happening to the Patent Office. I say that for the record and for posterity. That has got to be the weakest link in the competitive system in America." (Tr. at 68-69)

10. This was not the first time Judge Lord attempted to defeat a settlement proposal being considered by the parties to this litigation.

Three months earlier, in May 1971, defendant Pfizer's counsel, John Thomas, received a phone call from Attorney Stephen Swig representing plaintiffs in the State of Hawaii action. Mr. Swig told Mr. Thomas that the Attorney General of Hawaii now wished to accept the so-called "Alabama Plan" settlement.* Mr. Thomas said that all defendants including Pfizer would accept Hawaii's offer to settle based on the Alabama Plan.

However, before defendants could implement this settlement offer it was withdrawn by a second phone call from Mr. Swig. Mr. Swig related that he had just had a telephone conversation with Judge Lord. Judge Lord had informed Mr. Swig that he would refuse to approve this settlement or any settlement at the "Alabama Plan" level. Mr. Swig said that in light of the Court's attitude the defendants should consider Hawaii's offer to settle withdrawn. Judge Lord by letter dated May 14, 1971 and addressed to counsel in all cases confirmed his telephone conversation with Mr. Swig and, apparently, with the Attorney-General himself, stating that it would be "awkward" to approve the settlement on the basis of the meagre information then before him, and stating in addition that an adoption of Judge Wyatt's prior settlement opinion would involve "an evaluation of the plaintiffs' prospects" which the Court was not prepared to do "at this time."

Particularly after the approval of the "Alabama Plan"

---

* Under an offer of February 6, 1969 as modified May 9, 1969, defendants had offered $100,000,000 to settle the claims of all states, consumers, retailers and wholesalers. As implemented this offer became known as the Alabama Plan." Under it, some $85 million was deposited in escrow for 43 accepting states, their consumers and all retailers and wholesalers in the United States. That settlement plan was approved by the District Court (Judge Inzer B. Wyatt presiding), 314 F. Supp. 710 (S.D.N.Y. 1970) and affirmed by the Court of Appeals for the Second Circuit 440 F. 2d 1079 (2d Cir. 1971).

settlements for 43 other states by the Second Circuit, Judge Lord had a duty to hold a hearing on the proposed settlement, and not to discourage and impede any further settlement on that basis.

11. The events described in paragraphs 8, 9 and 10 supra, concerning Judge Lord's actions with respect to the Edelblute deposition and the proposed settlements of the United States and Hawaii actions, are not isolated instances. The bias manifested more openly during recent events is underscored by many other incidents and events during the past year. When considered with his overall demeanor and the entire history of his handling of this litigation, it compels affiants to conclude that Judge Lord's attitude and disposition here, by reason of bias, is that of an advocate of plaintiffs' cause and a prosecutor against defendants, rather than an impartial judge. We set forth in the following subparagraphs incidents which we believe further support our conclusions of bias.

It must be appreciated that Judge Lord, an experienced and sophisticated judge, has not formally stated his bias on the record. Indeed, Judge Lord has been scrupulous in "protecting the record."

(a) On December 18, 1970, at a noon meeting in chambers attended by plaintiffs' attorneys John Cochrane and Richard Johnson, and John French and Michael Bress for defendants, Judge Lord indicated that he was going to instruct state

plaintiffs to withdraw their then pending parens patriae motions (although, in his words, as a former attorney general he was sympathetic in general with the concept) and instead emphasize the class action approach to get the money back to the persons whom he described as having been "cheated."

(b) Prior to the assignment of the litigation to Judge Lord, defendants had put in issue, in the form of requests to admit, strong evidence that certain of plaintiffs' counsel (who were seeking to represent large classes under Rule 23), had attempted to solicit clients to bring into the proceedings. During an informal lunch at Schiek's Restaurant in Minneapolis on December 12, 1970, attended by Judge Lord, J. Gordon (law clerk for Judge Wyatt) and Attorneys F. Boline, R. Johnson, J. French, M.Bress and G. Busdicker, Judge Lord brushed aside the possibility of solicitation by plaintiffs' lawyers based on his view that solicitation was a lesser evil than leaving injured people uncompensated.

(c) At the Minneapolis pretrial conference of February 9, 1971, defendants were arguing that the plaintiffs' proposed program for massive broad discovery into defendants' foreign operations was highly inappropriate and improper under the Federal Rules of Civil Procedure. Judge Lord took an unusual approach to this situation:

> "THE COURT: Well, now, let me make this observation here to you, so that you will get it and so that it be on the record, that some people have expressed the feeling that discovery should now be over, that this case has been in effect in litigation for 20 years, and that there is nothing for these plaintiffs to do except put together the known parts of this puzzle and retry the case. But the last judge that reviewed this case and reviewed everything that I know about it that exists by way of evidentiary material, said that the plaintiffs have no better than a 50-50 chance of winning, and that was Judge Wyatt. And I don't feel that

I should force the plaintiffs into trial with no more evidence in the light of Judge Wyatt's valuation. If he said there is a 50-50 chance, it's at least enough indication that there may be a lawsuit here so that I should allow discovery. If he says there is only a 50-50 chance, I am very reluctant to require that the plaintiffs go to trial with those odds against them as long as they are willing to look for more evidence." (Tr. at 203).

* * * *

"Why don't we spend more time trying to find out where, if anywhere, there are such documents in the United States. You see, what concerns me is that you plaintiffs seem to have given up on ever finding anything and establishing the case within the Continental confines of the United States, but that you are going around the outside of the crater and never getting down into the volcano where the hot stuff is." (Tr. at 209)

(d) During pretrial conferences on May 5 and June 9 of 1971, Judge Lord appealed to plaintiff United States to share its documentary resources with the other plaintiffs. (5/5/71, Tr. at 125-26; 6/9/71, Tr. at 134). The Court also indicated this sharing would be a condition precedent to the Government's right to settle with the defendants. (9/8/71, Tr. at 63, 79)

(e) During the course of discovery, defendants claimed privilege on certain documents and submitted them to Judge Lord for his in camera inspection to rule on the asserted privilege.

In addition, defendants distributed schedules setting forth the author, date and subject of each privileged document to the Court and plaintiffs. Judge Lord, sua sponte, issued to all counsel on August 9, 1971 a signed memorandum directing defendants to produce to the Court "all documents claimed as privileged including files of counsel, outside and inside, of the defendants. Counsels' files should be submitted in their entirety without exclusion of any documents, * even if thought to be non-privileged or not relevant. . . . " Later during the aforementioned Edelblute deposition, Judge Lord urged the United States Government to remain in the case and cited these documents as an inducement for them to do so. (Tr. Vol. V at 446-47, compare 9/8/71, Tr. at 49-50, 63). [No ruling on the attorney-client documents had been made at that time, and indeed none has been made to date.] Motivation behind the Court's letter of August 9 was articulated at the July 27 pretrial conference.

> "THE COURT: I want those documents [files of outside attorneys for defendants] because I have to consider the other question of whether or not you have been unwittingly tools to a scheme to promote an illegal plan.
>
> "MR. WILLIAMS [Counsel for Pfizer]: As far as I know, Your Honor, I am never an unwitting tool, and I will take exception to that.
>
> "THE COURT: When I get through with you, I may have to call you that; whether or not unwitting, maybe, or maybe if you want to be unwitting I don't know what the ruling is yet." (Tr. at 112)

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* "Internal files" of outside counsel were subsequently excluded from the scope of the memorandum.

This comment is exceptionally revealing since it was made in the absence of any suggestion by plaintiffs that defendants' counsel in these cases or in prior related cases were in any manner, either knowingly or unknowingly, connected with defendants' alleged illegal activities and since the Judge later admitted that he did not understand most of the documents on which privilege was claimed (9/8/71, Tr. at 49).

(f) In another sequence of events in early August, Judge Lord said in substance that some of Bristol's documents indicated to him that Bristol's lawyers were affirmatively participating in the "doctoring" of evidence. He also said that it was not going to bother him to find that "lawyers were part of the conspiracy." The details of these events are set forth in the separate affidavit of Frank A. Sprole.

(g) Judge Lord has also solicited lawsuits against defendants. At the pretrial conference on March 6, while recognizing that it "isn't the kind of thing to spread on the record" (Tr. Vol. I at 157) he "urged," "invited" and "drafted" (the Judge's words) a private attorney (Paul Scanlon) to go out and find some hospital patients to form a class which none of the litigating plaintiffs had yet sought to represent (Tr. Vol. I at 154).* Defense counsel, strenuously objecting to this "invitation" to engage in unethical professional conduct, pointed out that it was not the Court's duty to make certain all possible claims against defendants were being asserted (Tr. Vol. I at 159). However, Judge Lord persisted in the matter (Pretrial Conf. 3/17, Tr. Vol. I at 251; Tr. Vol. II at 33-34), to the extent of suspending the ban on class member communications entered by Judge Wyatt to protect against just such abuses. (Tr. Vol. II at 38).

* The Court subsequently dismissed the claims of the hospital patient class.

12. Each of the affiants has regretfully and reluctantly concluded that Judge Lord possesses such prejudice against the defendants that he will be unable, even exercising the greatest personal discipline, to provide defendants with a fair trial.

Julian O. Von Kalinowski
Gibson, Dunn & Crutcher
634 South Spring Street
Los Angeles, California

Subscribed and sworn to before me this 16th day of September, 1971.

Notary Public

ALFRED H. HODDINOTT, JR.
Notary Public State of New York
No. [illegible]
Qualified in New York County
Commission Expires March 30, 1972

Robert E. Cooper
Robert E. Cooper
Gibson, Dunn & Crutcher
634 South Spring Street
Los Angeles, California

Subscribed and sworn to before me this 16th day of September, 1971.

Notary Public

[illegible]

John W. Thomas
Legal Division
Pfizer, Inc.
235 East 42nd Street
New York, New York

Subscribed and sworn to before me this 16th day of September, 1971.

Notary Public

ALFRED H. HODDINOTT, JR.
Notary Public State of New York
No. [illegible]
Qualified in New York County
Commission Expires March 30, 1972

Peter Dorsey
Dorsey, Marquart, Windhorst, West & Halladay
2400 First National Bank Building
Minneapolis, Minnesota 55402

Subscribed and sworn to before me this day of September, 1971.

Notary Public

Samuel W. Murphy, Jr.
Donovan Leisure Newton & Irvine
Two Wall Street
New York, New York 10005

Subscribed and sworn to before me this 16th day of September, 1971.

Notary Public

ALFRED H. HODDINOTT, JR.
Notary Public, State of New York
No. 31-4928675
Qualified in New York County
Commission Expires March 30, 1972

Merrell E. Clark, Jr.
Winthrop, Stimson, Putnam & Roberts
40 Wall Street
New York, New York 10005

Subscribed and sworn to before me this 16th day of September, 1971.

Notary Public

ALFRED H. HODDINOTT, JR.
Notary Public, State of New York
No. 31-4928675
Qualified in New York County
Commission Expires March 30, 1972

Roberts B. Owen
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D. C. 20006

Subscribed and sworn to
before me this 22 day
of September, 1971.

Notary Public

Commission Expires Oct. 31, 197

Allen F. Maulsby
Cravath, Swaine & Moore
One Chase Manhattan Plaza
New York, New York 10005

Subscribed and sworn to
before me this 21 day
of September, 1971.

Notary Public

ALBERT F. MARCELLINO
Notary Public, State of New York
No. 43-2519700
Qualified in Richmond County
Certificate filed in New York County
Commission Expires March 30, 1973

S/ JOHN D. FRENCH

John D. French
Faegre & Benson
1300 Northwestern Bank Building
Minneapolis, Minnesota 55402

Subscribed and sworn to before me this day of September, 1971.

Notary Public

S/ GORDON G. BUSDICKER

Gordon G. Busdicker
Faegre & Benson
1300 Northwestern Bank Building
Minneapolis, Minnesota 55402

Subscribed and sworn to before me this day of September, 1971.

Notary Public

S/ LAWRENCE J. HAYES

Lawrence J. Hayes
Maun, Hazel, Green, Hayes,
Simon & Aretz
332 Hamm Building
St. Paul, Minnesota

Subscribed and sworn to before me this day of September, 1971.

Notary Public

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

IN RE COORDINATED PRETRIAL PROCEEDINGS IN ANTIBIOTIC ANTITRUST ACTIONS	4-71-435 ALL ACTIONS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE COORDINATED PRETRIAL PROCEEDINGS IN ANTIBIOTIC ANTITRUST ACTIONS	M-19-93A ALL ACTIONS

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTRY OF NEW YORK)

EDMUND T. PRATT, JR., being duly sworn, deposes and says:

1. I am Executive Vice President of Pfizer Inc., with responsibility for the administrative divisions of Pfizer Inc., including the Legal Division. I have followed events in the above entitled litigation not only because of my responsibilities as Executive Vice President, but also because of the importance of the cases to Pfizer.

2. Pfizer respectfully requests this Court, the Honorable Miles W. Lord, to recuse itself pursuant to the Fifth Amendment to the Constitution of the United States and 28 U.S.C. § 144 from proceeding further as Judge in this litigation. I have concluded that Judge Lord possesses, and has possessed from and before his assignment to these cases, strong, unshakable prejudice against the defendants, including Pfizer, and that as a result, Judge Lord has acted as a prosecutor and advocate on behalf of the plaintiffs. I am convinced that Pfizer can not obtain a fair trial with Judge Lord presiding.

3. My conclusions concerning Judge Lord's bias are based upon facts, events and observations related to me by Pfizer's counsel, and upon my own review of the proceedings herein. The specific details of the facts, events and observations upon which my conclusions are based are recited in the joint affidavit of Messrs. von Kalinowski, Cooper and Thomas, counsel for Pfizer, and other defendants' counsel, submitted herewith, which I hereby refer to and which I hereby incorporate by reference as though set forth in full herein.

WHEREFORE, defendant Pfizer Inc. demands that the Honorable Miles W. Lord proceed no further in this cause, and that another judge be assigned to hear this action.

Edmund T. Pratt, Jr.

Subscribed and sworn to before
me this 16th day of September, 1971.

Doris J. Russert
Notary Public

DORIS J. RUSSERT
Notary Public, State of [illegible]

CERTIFICATE OF COUNSEL

ROBERT E. COOPER, being Counsel of Record for the defendant Pfizer Inc., does hereby certify that EDMUND T. PRATT, JR. of Pfizer Inc. has made the attacned affidavit on the advice of counsel in the good faith and genuine belief that the facts stated therein and the conclusions drawn therefrom are true.

The aforesaid affidavit and the facts and conclusions stated therein are based in part on information that I related to the affiant, and I certify my good faith and belief in their truth.

GIBSON, DUNN & CRUTCHER

By Robert E. Cooper
Robert E. Cooper

Attorneys for Pfizer Inc.
235 East 42nd Street
New York, New York 10017
(212) 573-3407

LAWRENCE J. HAYES, being local Counsel of Record for the defendant Pfizer Inc., does hereby certify that EDMUND T. PRATT, JR. of Pfizer Inc. has made the attached affidavit on the advice of counsel in the good faith and genuine belief that the facts stated therein and the conclusions drawn therefrom are true.

The aforesaid affidavit and the facts and conclusions stated therein are based in part on information that Robert E. Cooper, Esq. related to the affiant, and I certify my good faith and belief in their truth.

MAUN, HAZEL, GREEN, HAYES, SIMON & NEW

By /s/ Lawrence J. Hayes
Lawrence J. Hayes

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

IN RE COORDINATED PRETRIAL PROCEEDINGS IN ANTIBIOTIC ANTITRUST ACTIONS	:	4-71 Civ. 435 ALL ACTIONS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE COORDINATED PRETRIAL PROCEEDINGS IN ANTIBIOTIC ANTITRUST ACTIONS	:	M-19-93A ALL ACTIONS

AFFIDAVIT

HAROLD B. GROSS, being duly sworn, deposes and says:

1. I am Secretary and General Counsel of American Cyanamid Company ("Cyanamid"), a defendant in each of the above-captioned actions. Because of its extraordinary importance to Cyanamid, I have been attentive to the progress of this litigation, and I make this affidavit on Cyanamid's behalf.

2. Cyanamid respectfully applies, pursuant to the Fifth Amendment to the Constitution of the United States and 28 U.S.C. Sec. 144, for this Court, the Honorable Miles W. Lord, to recuse itself from proceeding further as Judge in this litigation. It is Cyanamid's belief that Judge Lord possesses, and has

possessed from and before his assignment to these cases, a strong, unshakable prejudice against the defendants, including Cyanamid, which has led him to adopt the mantle of prosecutor-judge in the conduct of pretrial proceedings. As a consequence, Cyanamid's ability to obtain the fair hearing which is its inalienable right is jeopardized.

3. My conclusions concerning Judge Lord's bias are based upon facts, events and observations related to me by Cyanamid's counsel and upon my own review of the proceedings herein. The specific details of the facts, events and observations upon which my conclusions are based are recited in the paragraphs of the joint affidavit of counsel submitted herewith, which I hereby refer to and incorporate herein by reference.

WHEREFORE, defendant Cyanamid demands that the Honorable Miles W. Lord proceed no further in these actions, and that another judge be assigned.

Harold B. Cross

Subscribed and Sworn to before me this 16th day of September, 1971.

Notary Public

CERTIFICATE OF COUNSEL

SAMUEL W. MURPHY, JR. and PETER DORSEY, being Counsel of Record for the defendant American Cyanamid Company, do hereby certify that HAROLD B. GROSS of American Cyanamid Company has made the attached affidavit on the advice of counsel in the good faith and genuine belief that the facts stated therein and the conclusions drawn therefrom are true.

The aforesaid affidavit and the facts and conclusions stated therein are based in part on information that we have related to the affiant, and we certify our good faith and belief in their truth.

Samuel W. Murphy, Jr.

DONOVAN LEISURE NEWTON & IRVINE
Two Wall Street
New York, New York 10005

Peter Dorsey

DORSEY, MARQUART, WINDHORST, WEST & HALLADAY
2400 First National Bank Building
Minneapolis, Minnesota 55402

Attorneys for American Cyanamid Company

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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IN RE COORDINATED PRETRIAL PROCEEDINGS IN ANTIBIOTIC ANTITRUST ACTIONS : M 19-93A

: ALL ACTIONS

- - - - - - - - - - - - - - - - - - - x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

FRANK A. SPROLE, being duly sworn, deposes and says:

1. I am a Vice President of Bristol-Myers Company ("Bristol") and the head of its Legal Division. In the course of my duties I have been closely following the above entitled litigation, and I make this affidavit on the Company's behalf.

2. Bristol respectfully makes application to the Honorable Miles W. Lord that he recuse himself pursuant to the Fifth Amendment of the United States Constitution and 28 USC § 144 from proceeding further as Judge in this litigation.

It is my belief that Judge Lord possesses, and has possessed since before these cases were assigned to him, a prejudice and bias against the defendants, including Bristol, and their counsel, and that this bias and prejudice has led him to assume the role of a prosecutor and advocate for the plaintiffs in the conduct of pretrial proceedings herein. As a consequence, Bristol's right to fair and impartial pretrial proceedings henceforth, and its right to a fair trial, are imperiled.

3. My belief as to Judge Lord's prejudice and bias against Bristol and its co-defendants and their counsel is based upon events and observations related to me by Bristol's counsel and upon my own knowledge of the proceedings herein. The details of these events and observations are set out below upon information and belief and in the separate accompanying Joint Affidavit of Counsel which I respectfully refer to and incorporate herein by reference.

4. On Monday, August 2, 1976, Judge Lord called a conference of counsel on short notice. Attorneys for plaintiffs and for some defendants were present, but no lawyer for Bristol was able to attend. In the course of the conference Judge Lord said in substance that some documents submitted to him by Bristol under claim of attorney-client privilege showed Bristol's lawyers telling the Company how to doctor evidence or documents. Judge Lord referred to the firm of Fish, Richardson & Neave, who have been counsel to Bristol throughout the tetracycline litigations beginning in 1954 and who are of counsel in these pending cases.

5. On the following Monday, August 9, 1971, Judge Lord held a conference with counsel and with the Special Masters who have been appointed to consider claims of privilege. In the course of the conference, Judge Lord said in substance that some of Bristol's documents indicated to him that Bristol lawyers were affirmatively participating in the doctoring of evidence. Judge Lord said in effect "it's not going to bother me to find that the lawyers were part of the conspiracy; it doesn't trouble me a bit." Judge Lord identified two documents to which he referred as a letter dated Oct. 29, 1954 from

Charles H. Walker of Fish, Richardson & Neave to Philip I. Bowman of Bristol Laboratories, bearing document No. 1002, and a letter dated Nov. 5, 1954 from Charles H. Walker to Frederic N. Schwartz of Bristol Laboratories, bearing document No. 1059 A.

6. I have examined these two letters with care. I find nothing in either letter which supports the serious charge made by Judge Lord. The only explanation which in my opinion can account for his remarks is a prejudice against the defendants and their counsel, a prejudice of which he himself may not be conscious but which is nevertheless so deep-seated and powerful as to give rise to unjustified suspicions of impropriety and to cause him to assert charges of impropriety at a meeting where Bristol was not even represented.

7. In making this affidavit it is not my intention, nor is it Bristol's intention, to waive the attorney-client privilege with respect to the documents in question. We ask that Judge Lord re-examine the letters objectively and consider whether the remarks he made with respect to them do not reveal to him a personal prejudice against the defendants and their counsel.

WHEREFORE, for the reasons given above and in the separate accompanying Joint Affidavit of Counsel, Bristol respectfully prays that Judge Lord recuse himself from proceeding further as judge in this litigation.

Sworn to before me this
16 th day of September, 1971.

Frank A. Sprole

Notary Public

J. RICHARD
Notary Public, New York

CERTIFICATE OF COUNSEL

MERRELL E. CLARK, JR., JOHN FRENCH, and GORDON BUSDICKER, being Counsel of Record for the defendant Bristol-Myers Company, do hereby certify that FRANK A. SPROLE of Bristol-Myers Company has made the attached affidavit on the advice of counsel in the good faith and genuine belief that the facts stated therein and the conclusions drawn therefrom are true.

The aforesaid affidavit and the facts and conclusions stated therein are based in part on information that we have related to the affiant, and we certify our good faith and belief in their truth.

WINTHROP, STIMSON, PUTNAM & ROBERTS

By Merrell E. Clark, Jr.
Merrell E. Clark, Jr.
40 Wall Street
New York, New York 10005

FAEGRE & BENSON

By S/ JOHN D. FRENCH
John French

By S/ GORDON G. BUSDICKER
Gordon Busdicker
1300 Northwestern Bank Building
Minneapolis, Minnesota 55402

Attorneys for Bristol-Myers Company
345 Park Avenue
New York, New York 10022

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

IN RE COORDINATED PRETRIAL PROCEEDINGS IN ANTIBIOTIC ANTITRUST ACTIONS	:	4-71 Civ. 435 ALL ACTIONS

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

IN RE COORDINATED PRETRIAL PROCEEDINGS IN ANTIBIOTIC ANTITRUST ACTIONS	:	M-19-93A ALL ACTIONS

AFFIDAVIT

ROSS REID, being duly sworn, deposes and says:

1. I am Vice President and General Counsel of Squibb Corporation ("Squibb"), a defendant in each of the above-captioned actions. Because of its extraordinary importance to Squibb, I have been attentive to the progress of this litigation, and I make this affidavit on Squibb's behalf.

2. Squibb respectfully applies, pursuant to the Fifth Amendment to the Constitution of the United States and 28 U.S.C. Sec. 144, for this Court, the Honorable Miles W. Lord, to recuse itself from proceeding further as Judge in this litigation. It is Squibb's belief that Judge Lord possesses, and has possessed from and before his assignment

to these cases, a strong, unshakable prejudice against the defendants, including Squibb, which has led him to adopt the mantle of prosecutor-judge in the conduct of pretrial proceedings. As a consequence of Judge Lord's prejudiced, closed mind on the merits of the case and his becoming an advocate for plaintiffs and a prosecutor against defendants, Squibb's ability to obtain the fair hearing which is its inalienable right is jeopardized.

3. My conclusions concerning Judge Lord's bias are based upon facts, events and observations related to me by Squibb's counsel and upon my own review of the proceedings herein. The specific details of the facts, events and observations upon which my conclusions are based are recited in the paragraphs of the joint affidavit of counsel submitted herewith, which I hereby refer to and incorporate herein by reference.

WHEREFORE, defendant Squibb demands that the Honorable Miles W. Lord proceed no further in these actions, and that another judge be assigned.

Ross Reid

Subscribed and sworn to before
me this 16th day of September 1971.

Notary Public

GRACE D. CAFFREY, Notary Public
State of New York No. 41-5366900
Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30, 1972

CERTIFICATE OF COUNSEL

ALLEN F. MAULSBY and JOHN D. FRENCH, being Counsel of Record for the defendant Squibb Corporation, do hereby certify that ROSS REID of Squibb Corporation has made the attached affidavit on the advice of counsel in the good faith and genuine belief that the facts stated therein and the conclusions drawn therefrom are true.

The aforesaid affidavit and the facts and conclusions stated therein are based in part on information that we have related to the affiant, and we certify our good faith and belief in their truth.

Allen F. Maulsby

CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, N.Y. 10005

S/ JOHN D. FRENCH
John D. French

FAEGRE & BENSON
1300 Northwestern Bank Building
Minneapolis, Minnesota 55402

Attorneys for Squibb Corporation

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

IN RE COORDINATED PRETRIAL PROCEEDINGS IN ANTIBIOTIC ANTITRUST ACTIONS	:	4-71 Civ. 435 ALL ACTIONS

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

IN RE COORDINATED PRETRIAL PROCEEDINGS IN ANTIBIOTIC ANTITRUST ACTIONS	:	M-19-93A ALL ACTIONS

GERARD THOMAS, being duly sworn, deposes and says as follows:

1. I am Vice President and General Counsel of The Upjohn Company, a defendant in each of the above-entitled actions. Having been informed on a continuing basis as to the conduct of these cases, I make this affidavit in support of the defendants' joint motion for the disqualification of the Honorable Miles W. Lord.

2. Pursuant to 28 U.S.C. § 144 The Upjohn Company respectfully requests that the Honorable Miles W. Lord recuse himself from the present action on the ground that he has so aligned himself in support of the plaintiffs in these cases, and against the defendants, and has so demonstrated bias and prejudice against the defendants, that his immediate disqualification from the

conduct of all further proceedings in this litigation is essential in order to allow such proceedings to move forward with the fairness required by law.

3. The instant request is based upon information provided to me by defense counsel, including the information set forth in the joint affidavit of counsel submitted in support of the defendants' joint application for the disqualification of Judge Lord, which affidavit is incorporated herein by reference.

Gerard Thomas

Subscribed and sworn to
before me this 24 day
of September, 1971.

Notary Public

DISTRICT OF MINNESOTA

IN RE COORDINATED PRETRIAL PROCEEDINGS IN ANTIBIOTIC ANTITRUST ACTIONS	4-71 Civ. 435 ALL ACTIONS

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

IN RE COORDINATED PRETRIAL PROCEEDINGS IN ANTIBIOTIC ANTITRUST ACTIONS	M-19-93A ALL ACTIONS

CERTIFICATE OF COUNSEL

Roberts B. Owen, John D. French, and Gordon G. Busdicker, being Counsel of Record for the defendant The Upjohn Company, do hereby certify that Gerard Thomas of The Upjohn Company has made the attached affidavit on the advice of counsel in the good faith and genuine belief that the facts stated therein and the conclusions drawn therefrom are true.

The aforesaid affidavit and the matters stated therein are based on information that we have related to the affiant, and we certify our good faith and belief in their truth.

COVINGTON & BURLING

By _____
Roberts B. Owen

FAEGRE & BENSON

By _____
John D. French

By _____
Gordon G. Busdicker